evidence at the same time the three other contemporaneous papers, exhibits 3, 4 and 5, having reference to the same transaction. If we refer to page 15 of Mr. Risley's brief, paragraph 9, we see that he there admits that exhibits 1, 2, 3, 4 and 5 were received in evidence at the beginning of the trial. They were offered by Mr. Risley. (R. pp. 72 and 73.) To say that the referee intended to ignore the existence of these papers (exhibits 3, 4 and 5), is to impeach not merely his judgment, but his integrity as well. We shall assume that the referee was not dishonest.

That the referee did not intend to ignore any of these papers, but that he considered and construed them all together, is, we think, to be made out from the language of his report, as quoted in Mr. Risley's brief, commencing at page 51. He says:

"The referee on the evidence found:

"First, That the contracts in dispute, *including* "those contracts set out in the complaint, constituted "an absolute sale by the defendant (plaintiff in error) "to the National Harrow Co. of New York of the U. "S. letters patent, and licenses under the U. S. letters "patent * * * * were founded upon a good, "valuable, and adequate consideration, moving between the parties.

"Second, That the sales by the plaintiff in error of "its *patents and rights under the U. S. letters patent*, "including contracts attached to complaint, were "intended to and did settle existing controversies with "reference to the rights of the National Harrow Co. "of New York and the defendant."

Neither of these findings had reference to the license contracts A and B, exhibits 1 and 2, but had reference to exhibit 3, which is the paper showing an assign-

ment of the patents from the Bements to the Harrow Company, and it is this contract, exhibit 3, which the referee construed and found to be valid.

It was of all these papers that the referee was speaking when he said (see top of page 65 of Record): "I decide that the contract entered into in June, 1891, including the contracts A and B, between the National Harrow Co. of New York and this defendant, were good and valid contracts founded on adequate consideration, and were reasonable in their provisions, the contracts A and B imposing no restriction upon the defendant beyond those which the parties had a right from the nature of the transaction to impose and accept.

It was of all these papers that the referee was speaking when he said (bottom of page 67 of the Record):

"I decide that plaintiff is entitled to judgment in "this action against the defendant as follows:

"2. Decreeing that the contracts, including con- "tracts A and B, are good and valid contracts in law."

If he had in mind only "A and B," why use the word "including"?

Referring again to Mr. Risley's brief, page 52, paragraph 5, we find that he so understood the referee's finding, for he there says, "he (the referee) further found that *all the contracts in evidence* were legal, valid, and binding contracts," etc.

We shall assume that we have made it clear to the court that the referee found that all these papers, including exhibits 1, 2, 3, 4 and 5, were executed by the parties and went into effect as valid contracts.

The referee having found these facts, he will be held

to have found also certain other facts.

Dyke v. Spargur, 143 N. Y. 651.

Easthampton v. Bowman, 136 N. Y. 521.

(a) All the facts which appear upon the face of such papers as he found had been executed.

(b) All the facts which were necessary to support the findings that the contracts between the parties had been executed and gone into effect.

If this be conceded, then his findings of facts are considerably broader than a cursory reading of his report might indicate, and includes of a necessity a finding of the following facts:

1. That all those papers were contemporaneous and related to the same subject matter.

2. That like agreements between the National Harrow Co. and nineteen other manufacturers of float spring-tooth harrows were drawn up simultaneously with the contracts between the Harrow Company and Bements, and that none of them were to take effect until they all took effect.

3. That all these contracts undertook to fix the price at which float spring-tooth harrows should be sold throughout the United States, and contained many drastic provisions to that end.

4. That the contracts related to interstate commerce. These facts all appear on the face of the papers which the referee found had been executed.

5. The finding by the referee that the contracts were executed by Bements, necessarily carried with it the finding of a further fact, viz.: that similar contracts were entered into between the Harrow Company and the other manufacturers, without which the contracts with Bement were not to take effect.

With such facts before him, the question of the

validity of these contracts was a pure question of law, and they should have been held to be illegal, both by the referee and by the Court of Appeals of New York, under its own construction of its power and authority in the premises. It was held by the Court of Appeals in its opinion (see page 2 of the Appendix) that there are only three questions of law which that court can review, and one of these questions is, whether the conclusion of law of the referee is supported by the facts found by him. We venture the opinion that if the Court of Appeals had carefully analyzed the report of the referee and had come to understand that his finding covered all the facts we have indicated, that court would have reached the conclusion that such facts did not support the judgment, and their failure to reach that conclusion was a denial of the right of plaintiff in error under the federal ~~final~~ statute which this court has jurisdiction to review.

If we are wrong in our conclusion that the referee intended to find the facts which were undisputed, then his report should be treated as an attempt at a suppression of the facts, instead of a finding, and ought not to conclude any court. (See opinion of Bartlett, J., Appendix 21 and 22.)

The counsel for defendant in error lays stress upon the point that this court is bound by the findings of facts made by the State Court.

If it be conceded that this court is bound by the findings of facts of the State Court, to the finding of which court would it look if they did not agree? Would it look to the findings of the referee, or to those of the Appellate Division which has authority to review those of the referee? Certainly this court will

look to the findings of the court of last resort having jurisdiction of the facts unless there is some rule of law, binding upon this court, which forbids it.

Counsel for defendant in error claims there is such a rule, and cites Section 1338 of the New York Code, printed in the opinion of the Court of Appeals (Appendix, p. 3.) But the language of this provision, as well as the history of its amendment in 1895, as related in the opinion of the Court of Appeals in this case, shows that it was intended to be a limitation upon the power of the Court of Appeals of New York to review cases upon the facts.

But this statute does not purport to be a limitation upon any other court. Is it binding upon this court to the extent that this court is bound to presume that the Appellate Division agreed in all things with the referee as to the facts and did not find any additional facts? In other words, will this court permit a presumption created and intended to limit the jurisdiction of the Court of Appeals of New York to govern it in the face of the opinion of the Appellate Division, if it clearly shows that that court found the facts for itself, and in the face of the statute requiring it to do so?

The Court of Appeals seemed to incline to the view that the Appellate Division intended to find the facts for itself.

"The printed 'case' is not without indications that the learned justice who wrote for the Appellate Division intended a reversal upon the facts, etc." Opinion Ch. Justice Parker, Appendix 1.

This is further evidenced by the very frank admission of counsel for defendant in error, on page 54 of his brief, where he says: "If we are permitted to look

into the opinion of the court to determine upon what questions of law the Appellate Court reversed the judgment, it at once appears that the reversal of the judgment in the minds of the Appellate Court, as stated in its opinion, was on questions of fact."

If Section 1338 is not a limitation upon the power of this court, what is there to prevent the court's considering the case exactly as though that provision of the Code did not exist? If it did not exist, would not this court look into the opinion of the Appellate Division to see what it found the facts to be and take the facts so found in preference to those found by the referee if it took either?

If this be done, it will be seen that the learned justice who wrote for the Appellate Division took a broad view of the case, construed all the papers which were conceded to have been executed at the same time as parts of a single contract, gave due effect to the undisputed facts and circumstances showing a combination of substantially all of the manufacturers of harrows in the United States to control the trade, and reached the conclusion that the contracts were void in law as in restraint of trade.

It is not a matter of surprise that it did not occur to the Appellate Division to certify that it was reversing the referee's decision on questions of fact. So far as the facts affecting the legality of these contracts are concerned, there never has been any dispute about them. The referee made what is known as "a short decision," and Section 1022 of the Code did not require him, nor could either side call on him, to state all the facts. He could only be required to state "concisely the grounds on which the issues had been decided."

The practice under the New York Code, which permits the referee to make a "short decision," and deprives the parties of the right to call upon him for a fuller finding of facts (see opinion of Court of Appeals, Appendix, pp. 9 and 10) finds its justification in the fact that his decision is not final and that an appeal lies upon the facts, as well as the law, to the Appellate Division. It is to the opinion of the Appellate Court or to the record that this court *must* go for a full statement of the facts, for they do not appear, and the law does not require them to appear, in the report of the referee.

"It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court, in order to throw light upon the subject." National Foundry & Pipe Works vs. Oconto City Water Supply Co., 22 Sup. Ct. Reporter 111, and cases cited.

We must not lose sight of the fact that under the New York Code plaintiff in error had no way of securing a fuller finding, and that no exception could be taken to the omission of the referee to find facts requested. (Appendix to main brief, pp. 9 and 10.) The general exception to the finding and report of the referee and the specific exceptions to the conclusions of law, were duly taken. (Record, p. 368.) "It thus appears that by pleading, proof and exception, the defendant has availed himself of every remedy afforded by the Code of Civil Procedure." (See dissenting opinion of Justice Bartlett, Appendix to main brief, p. 22.)

How can it be said the Appellate Division reversed the findings of facts of the referee, when as a matter of

fact it did not dissent from any fact found by him, but simply made a fuller and clearer statement of *facts, which as we have seen* were necessarily within the purview of the referee's findings. It is a misuse of words to say that a case is decided upon the facts when the facts are not in dispute and the question is one of pure law.

We know of no better illustration of this than is to be found in the dissenting opinion of Mr. Justice Bartlett of the Court of Appeals, printed in the Appendix of our original brief, pages 21 and 22.

Take another illustration: Suppose this case had been tried before a jury, the contracts had been put in evidence, the circumstances under which they were made proved by the plaintiff's own witnesses, including the fact that eighteen out of twenty of the manufacturers of float spring-tooth harrows in the United States had combined together in making such contracts, would the question of the validity of such contracts be one of fact for the jury or one of law for the court? What question of fact would there be to go to the jury?

II.

Was a Federal question raised?

Counsel for defendant in error, in various parts of his brief, says that a Federal question was not raised in the State Court.

What could the plaintiff in error do more than it has done to secure the protection of the Federal statute? It pleaded it. The record discloses ample facts, which are either conceded or uncontradicted, to support the plea. Could the referee, by his failure to

find facts, which were clearly proved and not controverted, eliminate such facts from the case so as to bind this court and deprive the plaintiff in error of his rights under the constitution and laws? The decisions of this court cited on pages 23 and 24 of our original brief are against it. To so hold, would be to say in effect that this court is, after all, in the hands of the State courts and that it cannot protect a citizen whose rights under a Federal statute have been invaded if the State Court *fails to find* the facts which show him to be entitled to such protection, even though such facts are conceded or conclusively proved.

The theory upon which this court has been given and exercises the right to review the judgments of State courts, is that the latter may, through mistake, ignorance, or even wilfulness, fail or refuse to give effect to the constitution and laws of the Union. What a citizen of the United States is entitled to at the hands of this court, is its judgment as to whether, *upon the whole case as submitted to it*, the Federal constitution and laws, to which he has appealed, afford him protection. This right may not be secured to him by the judgment of this court upon the law, merely. Whoever is allowed to state the facts of a case has gone far towards determining the law.

We are aware of the rule stated in Dower vs. Richards, 151 U. S. 658, and later cases, that "*when the facts are found below*, this court is concluded by such findings." But none of those cases go farther than to hold that the same rule will be applied to cases in equity, brought up by writ of error to a State Court, that has always been applied to suits at law. What, then, is that rule? It has always been good ground of error that the judgment was not supported by the

admitted facts or the undisputed evidence, and, in such case, when a bill of exceptions has been settled and sent up with the record, the Appellate Court will examine the record to determine whether there is any conflict in the evidence. The reason for this rule is that every judgment must have evidence tending to support it, and when the evidence is undisputed or the facts admitted, it is always a question of law whether such facts do support a judgment.

In Alexandre vs. Machan, 147 U. S. 72, Mr. Justice Brown states the rule as follows in an admiralty case:

"3. If the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court. The Francis W. Wright, 105 U. S. 381; The E. A. Packer, 140 U. S. 360; 11 Sup. Ct. Rep. 794."

III.

CAN PLAINTIFF IN ERROR CLAIM THE PROTECTION OF THE ANTI-TRUST STATUTE IN THIS ACTION?

Counsel for defendant in error cites several cases which hold that under the anti-trust law, a private party cannot maintain a bill for an injunction for an alleged breach of the act except through the District

Attorney on the authority of the Attorney General. But those cases have no relevancy to the question here. If the contracts in suit in this case are of the class which are declared by the act of Congress to be illegal, then they are illegal for all purposes, and everywhere, and it is the duty of every court, State or National, before which such contracts are sought to be enforced, to declare their illegality and to refuse to enforce them. This duty rests as much upon the State as upon the Federal courts, and the failure of the State Court to perform its duty in this regard is a wrong against the plaintiff in error, which this court will redress.

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